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In the Supreme Court of the United States

OCTOBER, 1933, TERM.

No. 820.

THE FAIRPORT, PAINESVILLE AND EASTERN RAILROAD COMPANY,
Petitioner,

vs.

MAYME F. MEREDITH,
Respondent.

REPLY BRIEF FOR PETITIONER.

ELBERT F. BLAKELY,
HARRY T. NOLAN,
Painesville, Ohio,

ATLEE POMERENE,
THOMAS M. KIRBY,
Cleveland, Ohio,
Attorneys for Petitioner.

ALVORD, BLAKELY & OSTRANDER,
SQUIRE, SANDERS & DEMPSEY,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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THE FACTS.

Ordinarily we would not be disposed to answer opposing counsel's statement of the facts. However, lest our silence may be taken for acquiescence, we feel required to refute some of the many mis-statements of fact appearing in respondent's brief, although we are of the decided opinion that the same are not relevant to the question involved in this case.

1. The railroad is two or two and one-half miles distant from the City of Painesville. (Record, page 283.) It nowhere approaches the City limits, and the statement in respondent's brief that it crosses streets in said City is untrue. Neither is Hardy Road within the limits of Painesville; on the contrary, it is some three miles distant. The entire movement on the day of the accident was in the country outside of any municipality.

2. The statement in respondent's brief, that a number of large trees along the side of the road were removed short-

ly after the accident, is untrue. Some of these trees, however, were removed the next year. (Record, page 145.) There were no trees on the railroad right of way, and the nearest tree mentioned was 85 feet distant from the crossing. (Record, pages 146-256.) The maps and exhibits introduced on both sides show the condition as it existed at the time of the accident. (Plaintiff's Exhibits B, 1, 2, 5. Defendant's Exhibits A and B.)

3. The railroad tracks used by this defendant in moving the train in question across the highway known as Federal Route No. 20 were the tracks of The New York Central Railroad Company, and not of this company. (See Plaintiff's Exhibits 6 and 8.) Respondent persists in the misleading statement that this company failed to maintain whistling posts at said crossing, and in the claim that the railroad failed to maintain whistling posts at other crossings. Whistling posts were maintained at every crossing on the main line, but not in the yards. Further, there is no statutory requirement in Ohio for the maintenance of whistling posts.

4. The respondent asserts that the train was caused to come to a stop, not by any efforts of the crew, "but by reason of the automobile under the tender." There is no evidence to support this statement. The record shows that the train gradually slowed down after the application of the brakes until it came to a stop. (Record, pages 207-237.)

5. The air hose was not coupled between any of these cars. (Record, page 64.)

6. On the main line the trains of this railroad were operated by train orders and by directions set forth in bulletins. Yard rules governed on that part of the railroad designated as the yard. (Record, pages 283-284.)

7. In respondent's brief, it is boldly stated that no signals were given. Six disinterested witnesses testified that

the signals were given, (Record, pages 171, 176, 178, 181, 182, 187, 188, 194, 200), and the crew also testified to that effect. (Record, pages 206, 218, 222, 234, 263.)

No witness other than the plaintiff and her daughter testified that signals were not given. One witness testified that he did not hear signals. (Record, page 59.)

8. In respondent's brief it is stated that the evidence overwhelmingly shows that there was no sand used on the rails while the engine was moving the 657 feet. No such evidence was introduced. The plaintiff made no effort to introduce any testimony relating to sand in chief, but in rebuttal called two or three witnesses who visited the scene some hours after the accident and after the train had been moved twice over the rails. They testified that they did not see any sand on the rails at that time. (Record, pages 308, 312.) The engineer operating the engine at the time of the accident died before the trial. His deposition had been previously taken by plaintiff wherein he testified that he applied sand. However, the deposition was not signed and therefore not offered in evidence, but the engineer's statement appears in this record in connection with the motion for a new trial. (Record, page 26.) No other testimony relating to sand was offered. The presumption that the engineer performed his full duty is not overcome by any testimony offered.

9. That one rail of the track was smeared with oil for a long distance and the other for a shorter distance is conclusively shown by the evidence. Four witnesses, three of whom were members of the train crew, testified that there was oil on the rails. (Record, pages 222, 223, 241, 267, 279, 280, 289.) Dr. Carmody, who treated the respondent at the hospital immediately after the accident, testified that there was oil on her clothing. (Record, page 137.) The same witnesses who testified that they saw no sand, also

testified that they did not see oil on the rails some hours after the accident. (Record, pages 308-310-312.)

10. In respondent's brief it is stated that "the evidence shows without any contradiction that in the exercise of ordinary care the train could have been stopped in less than 300 feet by the use of the air brakes on the tender and locomotive engine." That is a mis-statement. Plaintiff's own expert (Jones) testified that it would be "hard telling when you would stop" if there were oil on the rails. (Record, page 78.) It was testified by Mr. Dixon, the manager of the railroad, with experience as an engineer, that in his opinion the train could not have been stopped in any less distance. (Record, page 296.)

Moreover, the testimony of the witnesses, Fisher and Jones, called as experts by the plaintiff (respondent), was incompetent for the reason that the hypothetical questions propounded misstated some and entirely omitted other material and vital facts appearing in the evidence.

ARGUMENT.

I.

THE SAFETY APPLIANCE ACT.

Opposing counsel seems to misapprehend our position in regard to the Federal Safety Appliance Act. This train was engaged in interstate commerce at the time of the accident and the Federal Act is the only one which could possibly apply. We concede that this train was subject to the provisions of that act, but contend that this legislation does not inure to the benefit of the respondent, who was a traveler upon a public highway and not a member of the class for whose benefit the statute was passed.

However, if the Federal Act does not apply and the Ohio act does apply our position would be the same, for the Ohio act is substantially identical with the Federal Act

(*Erie Railroad Co. vs. Solomon*, 237 U. S. 427) and was not enacted for the benefit of travelers upon the public highway.

However, in respondent's brief it is stated that the Ohio "brake law" has been "interpreted to protect not only the railroad men and those on the train but all of its citizens, for the court of Ohio have consistently held just opposite of what opposing counsel contends." Respondent's counsel fail to cite any authorities whatever in support of this statement, and in fact there are none, for the rule is to the contrary so far as the courts have made any statements concerning it. The case of

McGarvey vs. Railway Company, 83 O. S. 273,

involved the application of the Ohio Safety Appliance Act in an action for injury suffered by an employe. The court said at page 287:

> "The object of the statute as stated in the title, was to promote the safety of employes and travelers upon railroads."

We have been unable to find any Ohio case holding that this act creates a duty in favor of any person other than an employe or traveler upon the railroad.

The courts of other states have passed adversely upon the contention of the respondent herein. It was held in the case of

Indianapolis & Cincinnati Traction Co. vs. Rogers, 79 Ind. 173, 134 N. E. 669,

that

> "In an action for injuries from being struck by an interurban car at a street crossing, it is error to give an instruction based on *Burns' Ann. St. 1914*, Section 5283, requiring steam and electric railways to equip cars with air and hand brakes, which has no application to the safety of the general public."

See also

Lindsey vs. Bluefield Produce & Provision Company, 91 West Va. 118, 112 S. E. 310.

Respondent cites the case of

Pennsylvania Railroad Co. vs. George R. Moses, Administrator, 42 Ohio Appellate 220.

The real point determined in that case is that "a violation of the orders of the Interstate Commerce Commission prescribing equipment for a locomotive engine engaged in interstate commerce constitutes negligence *per se.*" The Boiler Inspection Act was not involved. At no time in that case was the direct question raised as to whether or not the order inured to the benefit of the plaintiff, a traveler upon the highway.

The order of the Interstate Commerce Commission referred to required that:

> "Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive engine men, to see in a clear atmosphere a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight."

Whatever construction may be placed upon the order of the Interstate Commerce Commission relating to headlights, or upon the Hours of Service Act, it is to be borne in mind that these acts are not involved in the instant case. We are here concerned only with the construction of the Safety Appliance Act, which act, as we have hereinbefore pointed out, was designed to protect employes by requiring certain appliances for their safety.

II.

LAST CLEAR CHANCE.

Opposing counsel insist in their brief, that, under the allegations of the amended petition, the doctrine of the Last Clear Chance is involved. We deny this claim. It is true that in plaintiff's amended petition the third specification of negligence is as follows:

> "Third: In causing plaintiff said injuries when the defendant, through its employees, actually knew of the great danger in which plaintiff was placed so that said defendant had ample time in the exercise of ordinary care to have prevented said injuries after they had such actual knowledge."

The foregoing allegation is a mere conclusion, and not a statement of facts which would invoke the Last Clear Chance Rule. Furthermore, that conclusion is destroyed by the *facts* set forth in the amended petition, it being alleged:

> "That if said train could have been stopped short of the distance that it moved, no injury would have come to this plaintiff or her daughter; *that the reason that said train was not stopped many, many feet of less distance was because there were absolutely no air-brakes used nor could same be used* because of the failure of the conductor and other members of the crew to turn the angle-cock on the front of the nearest car to said locomotive engine and thereby permit the air to go into the train line, * * *." (Italics ours.)

It will be noted that the plaintiff did not aver that the engineer failed to use sand and did not aver that the members of the crew failed in any way to do everything possible after the danger of plaintiff was known. On the contrary plaintiff expressly avers:

> "Such actual danger was actually known to the said crew for all of such distance; *that nothing could be done by any member of the crew* upon any one of the thirty-two cars that would materially check the

movement of said train, and all of the brakes on said locomotive engine had been applied at or near to the highway crossing; *all of which was approximately produced by the failure to use and apply said stored air.*" (Italics ours.)

The plaintiff by these allegations confined her claim under the Last Clear Chance Rule to the failure of the Railroad to connect the air before the train movement commenced, which was about one half hour before the collision occurred. Since the plaintiff unequivocally pleaded that there was nothing which the crew could have done *after discovering* plaintiff's danger, it follows that the Last Clear Chance Rule was not involved in this case.

The Court of Appeals in the instant case held that the failure to connect the air was a continuing negligence. Under the pleadings, continuing negligence is the only basis under which the doctrine of the Last Clear Chance could be invoked. The court based its opinion upon the case of *Thompson vs. Salt Lake-Transit Company*, 52 Pac. Rep. (Utah) 92, which is the only case we have found tending to hold that a liability exists under such circumstances. This decision, if adhered to, would destroy the theory of the Last Clear Chance doctrine which is based upon the failure to exercise reasonable care *after* the perilous position of plaintiff is known, or as some jurisdictions hold, *after* the perilous condition of the plaintiff is known, or ought to have been known. It utterly destroyed the defense of contributory negligence made in the instant case.

The true rule is laid down in the case of

Illinois Central R. Co. vs. Nelson, 173 Fed. Rep. 915

where it was held:

"Under the rule that a railroad company may be liable for the injury of a person at a crossing, notwithstanding his contributory negligence, if after actually

discovering his peril the servants of the company could by the exercise of ordinary care have avoided his injury, but failed to do so, the company cannot be held liable if such failure resulted from a defect in appliances of the train, which existed previously, and which made it impossible to stop the train in time, notwithstanding the efforts of the trainmen."

The court at page 916 noted with approval an excerpt from the decision of the court in the case of *St. L. & S. F. R. Co. vs. Summers*, 173 Federal 358, where the court cited the *Chunn* case mentioned in respondent's brief herein, relating to the doctrine of "Last Clear Chance" and said:

"But in the application of this rule care must be taken to avoid undermining the rule of contributory negligence. Such negligence of the traveler, in law, fully exonerates the railroad company from the consequences of its original negligence, and some new and subsequent act of negligence must arise to create a cause of action; and this new or secondary act must be established by proof unaided by the former acts, which have been excused by the traveler's contributory negligence. Let us, therefore, inquire whether the servants of the railroad company had actual knowledge of the peril of the decedent, and whether with that knowledge it exercised reasonable care to avoid injuring him?"

The court in its opinion said on page 917:

"A defect in mechanical appliances, existing before and continuing until after the injury, not susceptible of being rectified after the discovery of the danger carelessly incurred and before the injury is done, is not supervening negligence within the rule invoked."

CONCLUSION.

The Court of Appeals of the Seventh Judicial District of Ohio, having erred in holding that the Federal Safety Appliance Act inured to the benefit of the plaintiff (respondent), we respectfully submit the judgment should be reversed.

Respectfully submitted,

ELBERT F. BLAKELY,
HARRY T. NOLAN,
Painesville, Ohio,

ATLEE POMERENE,
THOMAS M. KIRBY,
Cleveland, Ohio,
Attorneys for Petitioner.

ALVORD, BLAKELY & OSTRANDER,
SQUIRE, SANDERS & DEMPSEY,
Of Counsel.